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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 120.

UNITED STATES OF AMERICA,
Petitioner,

v.

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent.

BRIEF ON BEHALF OF RESPONDENT GUARANTY TRUST COMPANY OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel for Respondent.

THE BALLOU PRESS NEW YORK

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Statement.

The United States of America has petitioned for a writ of certiorari to review the judgment (R. 46-47) of the United States Circuit Court of Appeals for the Second Circuit entered in this action on March 19, 1934, which reversed the judgment (R. 32-33) of the District Court of the United States for the Southern District of New York.

* * * * * * *

The facts, which were stipulated by the parties (R. 12-28), are briefly as follows:

On or about October 29, 1921, a check was drawn on the Treasurer of the United States in the sum of $160, to the order of Louis Macakanja, and then the check was forwarded by mail to the payee at Maja, Jugo-Slavia. The name of the payee appears in writing on the back of the check on the line where the payee is required to sign. It has been stipulated that the endorsement of the payee is a forgery. The purported endorsement of the payee was made in Jugo-Slavia on or about November 30, 1921, and on that date the check was transferred and delivered to the "Merkur" Bank in Jugo-Slavia for a valuable consideration. Subsequently and about December 3, 1921, the "Merkur" Bank duly endorsed the said check and transferred and delivered it to the "Slavenska" Bank, D. D., Zagreb, in Jugo-Slavia, for a valuable consideration. Both banks received the check in good faith and took it without actual notice of any forgery or other defect, and were not guilty of any fraud or negligence in the matter.

On or about December 3, 1921, the "Slavenska" Bank, for value received, duly endorsed the check in Jugo-Slavia to the order of the Guaranty Trust Company of New York, the respondent in this action, and on the same day forwarded the check to the respondent by mail. The respondent received the check by mail from the "Slavenska" Bank on or about December 21, 1921, in good faith, and took it without actual notice of the forgery of the payee's endorsement or of any other defect, and was not guilty of any fraud or negligence in taking the same. The respondent was a purchaser of the check for value, and not a collecting bank. The respondent, after receiving the check, endorsed the same in New York and presented it to the Federal Reserve Bank of New York, as Fiscal Agent of the United States of America, for payment. The Treasurer of the United States, upon receipt of the check from the Federal Reserve Bank of New York, paid the same by crediting the Federal Reserve Bank of New York with the amount of the check, and that Bank in turn credited the respondent with the amount of the check some time in Decem-

ber, 1921. On April 27, 1926, the petitioner ascertained that the payee's endorsement on the check was forged, and on June 1, 1926, requested reclamation through the Federal Reserve Bank of New York from the respondent, which was refused.

The District Court gave judgment in favor of the Petitioner in the amount of $259.32 (R. 32-33).

The Circuit Court of Appeals reversed the judgment of the District Court (R. 46-47). The opinion of the Circuit Court of Appeals (R. 43-46) is reported in 69 Fed. (2d) 799.

Question Presented.

It is conceded that if the forged endorsement had been made in this country subsequent holders of the check, including the respondent, would have acquired no title and the petitioner could have recovered upon the theory that the respondent had no right to receive payment and so had been unjustly enriched. It is also conceded that under the law of Jugo-Slavia,* where the check was negotiated, the Jugo-Slavian banks acquired good title in spite of the forged endorsement. The question, therefore, is merely one of conflicts of laws involving a negotiable instrument: Whether or not the law of Jugo-Slavia controls in so far as the liability of the respondent is concerned.

It is not a question, as petitioner urges, of great public importance calling for the review and determination by this Court. The fact that the United States is a party to the action gives no color of importance to a question which primarily involves mercantile laws. Nor is the proper solution of the question in doubt. The decision of the Circuit Court of Appeals for the Second Circuit is in accord with the English rule of almost thirty years' standing, and with the rule prevailing in the State of New York.

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* The law of Jugo-Slavia with reference to checks and bills of exchange in 1921 is set forth correctly at pages 4 and 5 of the petition herein.

ARGUMENT.

I.

The Law of Jugo-Slavia Controls.

A.

THE LAW OF THE PLACE OF TRANSFER OF A NEGOTIABLE INSTRUMENT DETERMINES THE RIGHTS ACQUIRED BY THE TRANSFEREE.

Although the authorities on this subject are not legion, we submit that it is well settled that in determining whether a holder has acquired a valid or a good title to a negotiable instrument, the law of the place where the instrument was transferred should govern.

In England where the law with reference to forged endorsements is the same as in this country it has been squarely held in an analogous case that in determining a party's title to a check the law of the place where the check was transferred should govern and control. This case is *Embiricos* v. *Anglo-Austrian Bank,* 1 L. R. [1905] 1 K. B. 677.

The conflicts of law rule thus adopted by the English Court of Appeal was definitely approved by the Court of Appeals of the State of New York in the case of *Weissman, et al.* v. *Banque de Bruxelles,* 254 N. Y. 488, at page 494, and again in *Hutchison* v. *Ross,* 262 N. Y. 381, at 389, 390.

See also

McClintick v. *Cummins,* Fed. Cas. No. 8699;
Dundas, et al. v. *Bowler, et al.,* Fed. Cas. No. 4141;
Guernsey v. *Imperial Bank of Canada,* 188 Fed. 300.

The American Law Institute and leading writers on the subject adhere to the same view:

Goodrich—*Conflict of Laws,* pp. 361, 363 and 364;
Tentative Restatement of Conflict of Laws by American Law Institute, Draft No. 34, dated Oct. 16, 1930, Section 282, particularly the comment "d" thereunder;
Lorenzen—*The Conflict of Laws Relating to Bills and Notes,* pp. 139 and 140;
Minor—*Conflict of Laws,* pp. 392 and 393.

This Court has applied the same rule to intangible personal property, such as stock certificates in *Disconto—Gesellschaft* v. *U. S. Steel Co.,* 267 U. S. 22, at 28-29.

B.

THE TRANSFER OF THE CHECK IN QUESTION TOOK PLACE IN JUGO-SLAVIA.

The petitioner has stipulated that the transfers to the "Merkur" and "Slavenska" banks occurred in Jugo-Slavia. The transfer to the respondent was also made there. It is stipulated that the check was endorsed by the "Slavenska" Bank to the order of respondent for value, in Jugo-Slavia, and then mailed to respondent in New York. The placing of the check in the mails constituted, in legal effect, a delivery to respondent in Jugo-Slavia, and hence a transfer to respondent there.

See

Hayden v. *Chemical National Bank,* 84 Fed. 874; affirmed in 174 U. S. 610;
Chapman v. *Mills and Gibb,* 241 Fed. 715; affirmed 250 Fed. 1018.

Regardless of whether the transfer to the respondent be considered to have occurred in Jugo-Slavia or some other place the respondent acquired the same title which its transferor, the "Slavenska" Bank had at the time of transfer

(Title 22, Sec. 78 Code of Laws—District of Columbia, *infra*, p. 9). (Sec. 97 of New York Negotiable Instruments Law, *infra*, p. 9.) Therefore, in determining whether the respondent had good title to the check when it presented the same for payment, the law of Jugo-Slavia applies. Under the law of that country the respondent and the foreign banks obtained good title to the instrument and the right to collect and retain the proceeds thereof, since each gave value and took the instrument without notice of the forgery, fraud or negligence.

It should be noted that the petitioner sent the check by mail to the payee in Jugo-Slavia. In so doing petitioner must have anticipated that the check would necessarily be negotiated there in order for the payee to collect the proceeds, and thereby consented that the law of Jugo-Slavia with reference to the passage of title upon a forged endorsement should control.

II.

The warranty contained in the respondent's endorsement does not affect or defeat its right to retain the proceeds.

The Circuit Court of Appeals, we submit, was correct in holding that there was no breach of warranty in this case. There is no warranty or guaranty of prior endorsements except as relates to title, i. e., an endorsement merely guarantees that the prior endorsements are efficacious to transfer title. The courts invariably couple a warranty or guaranty of prior endorsements to the question of the passing of title.

Leather Manufacturer's Bank v. *Merchants Bank*, 128 U. S. 26 at pp. 34-35;

United States v. *National Exchange Bank*, 214 U. S. 302, at 316;

American Exchange National Bank v. *Yorkville Bank,* 122 Misc. 616, at 621, aff'd 210 App. Div. 885;

Insurance Co. of North America v. *Fourth National Bank,* 12 Fed. (2d) 100 at 101.

Naturally under the American law the question of a warranty of prior endorsements can hardly be separated from the question of title since under that law, if the payee's signature is forged, the instrument becomes wholly inoperative, and title does not pass (Title 22, Sec. 24, Code of Laws—District of Columbia, *infra,* p. 9). (Sec. 42—New York Negotiable Instruments Law, *infra,* p. 9). The warranty of an endorsement does not warrant the "authentic penmanship" of the payee but merely that the endorsement of the payee by whomever written was sufficient to pass title to the instrument. If the signature is written by an authorized agent of the payee, the penmanship is not that of the payee but of the agent, and yet the warranty of endorsement is not breached since title passes by reason of the agent's having been authorized to sign the payee's name. The same thing is true where the signature of the payee was originally unauthorized, but subsequently ratified. By reason of the substantive law in Jugo-Slavia, where the transfers of the check involved here occurred, the same result follows as in the case of an endorsement by an authorized agent in the United States. A warranty of signature, separate and apart from a warranty of title, would have no meaning and no consequences.

The fact that the Treasury Regulations required a guaranty of prior endorsements does not alter the situation since an express guaranty of prior endorsements cannot be more than a warranty that the prior endorsements are legally sufficient to pass title. The Government is bound by the same rules which affect ordinary individuals so far as commercial paper is concerned. *United States* v. *National Exchange* Bank, 270 U. S. 527, 534.

III.

Consideration of the fact that the instrument was drawn and payable in the District of Columbia.

If a transfer is complete and effective according to the law of the place where it takes place, so that the transferee gets good title to the instrument, and the legal owner thereof subsequently presents it for payment to the drawer-drawee, the obligation of the latter is governed by the law of the place where the instrument is payable, and that obligation is simply to pay the instrument according to its tenor (Title 22—Sec. 91—Code of Laws—District of Columbia, *infra,* p. 9) (Sec. 111—New York Negotiable Instruments Law, *infra,* p. 9). This obligation the petitioner cannot escape despite the subsequent discovery of the fact that the payee's signature was forged.

Counsel for the petitioner largely bases his argument on the conception that title to the instrument may be separated from the right to receive the amount due thereon. He concedes that a good title to the instrument passed to the "Merkur" Bank, but nevertheless argues that the successor in title cannot collect and retain the money. We submit this is a misconception of the whole theory of negotiability. The essence of a negotiable instrument is that the right to the money due thereon is inseparable from the ownership of the instrument.

CONCLUSION.

The petition for a writ of certiorari should be denied.

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel for Respondent.

July 25, 1934.

APPENDIX.

Statutes.

Title 22, Sections 24, 78 and 91 of the Code of Laws of the District of Columbia provides as follows:

> § 24. Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.
>
> § 78. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.
>
> § 91. The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

Section 42 of the New York Negotiable Instruments Law is identical to Section 24 of the Code of Laws of the District of Columbia, set forth above.

Section 97 of the New York Negotiable Instruments Law is identical to Section 78 of the Code of Laws of the District of Columbia, set forth above.

Section 111 of the New York Negotiable Instruments Law is identical to Section 91 of the Code of Laws of the District of Columbia, set forth above.